tion of fact for the jury—would affect simply the question of damages. If the offer was unacceptable, the damages would be only nominal. Here, too, an unreasonable delay upon the part of the offeror in making inquiries may be important as showing that he could not reasonably have relied so long on the expected acceptance of the contract and should have taken steps to mitigate the damages. Such questions would then all be matters of fact for the jury's decision in determining the amount of recovery.

Another question occurs where the offer is that of a proposed contract for the benefit of a third person. To whom is then the duty here in question owed? In the insurance case[12] it was held that it was owed to the estate of the decedent and not to the proposed beneficiary. This seems unjust, for the substantial loss falls upon the beneficiary and not upon the creditors or heirs of the applicant. The loss is that of an expectancy and while the courts have been slow to believe that interference with an expectancy is a breach of a duty, yet the trend of decisions seems that way.[13] Where the offeror goes so far as to make an offer of a contract for the benefit of a third party, the requirement of "immediacy" of the expectancy would seem to be satisfied.[14] Hence there would be a breach of duty to the offeror, whose damages are nominal and a breach of duty to the beneficiary, whose damages are substantial. But in jurisdictions where such beneficiary is held not to have a right against the promisor of a contract, this rule of law would prevent the legal recognition of the expectancy in this class of cases.[15]

C. E. C.

CONSTITUTIONAL UNLIMITATIONS

Again the question of free speech has come before the Supreme Court, this time in *Schaefer v. United States* (March 1, 1920) Oct. Term, 1919, Nos. 270-274. The opinions add little to the *Abrams* case.[1] The majority (Justice McKenna) states the contention of the defendants indicted under the Espionage Law as that "the morale of the armies when formed could be weakened or debased by question

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[12] *Duffie v. Bankers' Life Ass'n., supra.*

[13] See cases collected in (1918) 28 YALE LAW JOURNAL, 507. The cases of injunctions against labor unions are perhaps the commonest. In *Hall v. Hall* (1917) 91 Conn. 514, (1917) 27 YALE LAW JOURNAL, 263, such an action in connection with an expectancy as heir was denied. But see strong dicta in *Lewis v. Corbin* (1907) 195 Mass. 520. An early case is *Tarleton v. McGarvley* (1793) Peake, 205.

[14] (1918) 28 YALE LAW JOURNAL, 507.

[15] But the rule urged in the text should nevertheless exist even in such jurisdictions in the case of life insurance policies, since the beneficiaries are generally permitted to sue upon the policies. 1 Williston, *op. cit.*, sec. 369.

[1] (1919) 40 Sup. Ct. 17. See, for discussion of that case and of the principles involved, COMMENT (1920) 29 YALE LAW JOURNAL, 337.

or calumny of the motives of authority, and this could not be made a crime." "Verdicts and judgments of conviction were the reply to the challenge and when they were brought here our response to it was unhesitating and direct. *We did more than reject the contention; we forestalled all shades of repetition of it.* . . ." The dissent (Justice Brandeis, Justice Holmes concurring) seeks once more to counter with explicit references to the explicit language and limitations of language in the unanimous opinions in the *Schenck, Frohwerk,* and *Debs* cases,[2] insisting that the question of criminality of speech is one of degree. The special dissent of Justice Clark on the facts of the particular case is worth note: "I cannot see, as my associates seem to see, that the disposition of this case involves a great peril either to the maintenance of law and order and governmental authority on the one hand, or to the freedom of the press on the other. To me it seems simply a case of flagrant mistrial, likely to result in disgrace and great injustice, probably in life imprisonment for two old men."[3]

If one may judge the effect of the Eighteenth Amendment and the Volstead Act from *Street v. Lincoln Safe Deposit Co.* (Feb. 10, 1920, S. D. N. Y.) 62 N. Y. L. J. 1973 (Mar. 14, 1920), the hip pocket bids fair to become henceforward a useless ornament of male attire. For, under this decision, Congress has—and constitutionally—prohibited *any* transportation of liquors, even from safe deposit vault to dinner; and the *bona fide* dwelling has been fixed on as the only place where one may lawfully possess his liquor. In sober truth, a man's house would seem to have become his only castle.

If courts may properly overrule their own previous decisions and lay down a new rule of law for the determination of the powers, privileges, rights, and immunities of citizens;[4] and if they may properly

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[2] (1919) 39 Sup. Ct. 247, 249, 252.

[3] A careful reading of the three opinions leads one to the conclusion (1) that wilful *obstruction* of recruiting service was not shown, because no effects of the newspaper articles published appeared; but (2) that criminal *attempts* to cause insubordination were shown, if the majority's test of criminality be sound, and attempts, by mere words, to commit crimes can constitutionally be made criminal, although there is no indication of any danger that the crime in question will be committed; (3) that the publication of *false* reports with intent to interfere with the success of the forces of the United States was shown only if, when a fourth-rate newspaper condenses for publication news items otherwise permissible, without purporting to reproduce any particular source, such condensation produces "false" reports within the act.

[4] See *Fowler v. City of Cleveland* (1919, Ohio) 126 N. E. 72, to be commented on next month, holding that a municipal corporation must pay for injuries caused by the negligence of a driver of a fire hose wagon, and overruling *Frederick v. City of Columbus* (1898) 58 Ohio St. 538, 51 N. E. 35.

reverse their own decisions rendered on a previous appeal of the very same case and on the identical facts and pleadings;[5] it would seem to be anything but revolutionary for the Supreme Court of the United States to adopt a new method of announcing its decisions. The antiquity of the custom of announcement by oral reading in open court is no doubt one reason for continuing to follow it, especially at a time when so many are ready to condemn any custom for no reason other than antiquity; but the JOURNAL offers its support to the suggestion of a change in the present instance, in view of the business loss and inconvenience caused in the recent case of *Eisner v. Macomber* (March 8, 1920) U. S. Sup. Ct. Oct. Term, 1919, No. 318, when the newspaper reporter's misreport of the decision caused a considerable and unfortunate stock market flurry.

The gradual liberalization of the long recalcitrant New York from its old-time narrow position respecting foreign *ex parte* divorce decrees is gratifying. *Hubbard v. Hubbard* (Feb. 24, 1920, N. Y.) 62 N. Y. L. J. 2001 presented the following problem: a man and woman married in Pennsylvania and separated there, the man later becoming a resident of New York, the woman of Massachusetts. She there procured an *ex parte* divorce decree for desertion. Somewhat later, the woman married the present plaintiff, who was also a resident of Massachusetts, in North Dakota. Still later each of the couple became residents of New York. The first husband died. Then the second husband sought a decree of annulment, alleging the invalidity of the divorce decree. The court's decision was eminently sane. The marriage had been valid according to *lex loci contractus* and according to *lex domicilii* of both parties. To be sure: "We are at liberty to inquire into the validity of the divorce." But New York's public policy was held not to require in the circumstances the sanctioning of an attack on a marriage by one party to it, by reason solely of the *ex parte* character of a divorce whose procurement the plaintiff had himself instigated.[6]

Scharmann v. Union Pac. Ry. (1919, Minn.) 175 N. W. 554, discusses the effect of *ex parte* action even more interesting to the profession. A locomotive engineer was injured, and employed an attorney on a contingent fee of one-third to prosecute suit for him. Action was brought in Minnesota, issue joined, and the case placed on the calendar for trial, when an agreement of settlement was arrived at and the

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[5] *Johnson v. Cadillac Motor Car Co.* (1919, C. C. A. 2d) 261 Fed. 878, reversing (1915, C. C. A. 2d) 221 Fed. 801.

[6] The case stands in pleasing contrast to the stiff policy behind *In re Grosman's Estate* (1919, Pa.) 106 Atl. 86, 28 YALE LAW JOURNAL, 821. Discussion of the effect of *ex parte* divorce decrees more at length can be found in COMMENT (1917) 27 *ibid.*, 117; (1913) 23 *ibid.*, 88.

action dismissed. Later, the settlement never being consummated, a new action was brought. This time the plaintiff settled for less money, and dismissed the action without letting his attorney know anything about it. Later the defendant sought in Nebraska to interplead the attorney and the plaintiff's representatives, paying one-third of the second settlement into court. A default was entered against the attorney, and his claim adjudged void for champerty. But when the attorney applied to the Minnesota court to reinstate his cause and allow him to intervene and enforce his lien, his application was granted. The court held the Nebraska court's action to be a nullity, both as to the judgment, and as to the findings on which it was based. For if an attorney be employed in Minnesota, and a Minnesota court once acquires jurisdiction of the cause of action and of the parties, the attorney's lien on the cause of action is and remains subject to Minnesota law, as against *ex parte* action elsewhere.

All lovers of legal theory, however, will feel distressed that the attorney was not served personally in Nebraska. It would be very interesting to discover whether the Minnesota court would in such a pinch adhere to the strong hints dropped in its discussion: that the law-suit in this case was a Minnesota *res,* subject exclusively to the control of the courts of suit. How far the decree of a foreign court of equity regarding land will be recognized at the situs is still a matter of dispute.[7] Must one refer to the same rules, as to attorney's liens?

So that the times are not wholly dark for the lawyers, despite the rulings on the income tax. It is good, too, to see a serious attempt being made to check the more objectionable features of "claim-adjustment." Texas passed statutes on the subject, prohibiting personal solicitation of employment in law-suits. But the courts held that the statute applied only to lawyers, which left the bulk of the evil untouched. So the legislature amended the law to cover claim adjusters and collectors. The new provision, under attack as a deprivation of liberty and property, has been upheld in *McCloskey v. Tobin* (March 1, 1920) U. S. Sup. Ct. Oct. Term, 1919, No. 79. Admitting that tort claims, once made assignable, become an article of commerce, still says the court, "to prohibit solicitation is to regulate the business, not to prohibit it," and so within the power of the legislature.

[7] See Barbour, *The Extra-territorial Effect of the Equitable Decree* (1919) 17 MICH. L. REV. 527.